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IN THE

Supreme Court of the United States

THE NEW YORK TIMES COMPANY, INC.; NEWSDAY, INC.; THE TIME INCORPORATED MAGAZINE COMPANY; LEXIS/NEXIS and UNIVERSITY MICROFILMS INTERNATIONAL,

Petitioners,

v.

JONATHAN TASINI; MARY KAY BLAKELY; BARBARA GARSON; MARGOT MIFFLIN; SONIA JAFFE ROBBINS and DAVID S. WHITFORD,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT PURSUANT TO RULE 29.6

The corporate disclosure statement for each Petitioner is set forth at page ii of the Brief for Petitioners, and there are no amendments to those statements.

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SUMMARY OF THE ARGUMENT

Publishers have the right to reproduce and distribute electronic copies of their collective works under Section 201(c) of the Copyright Act. Petitioners' opening brief demonstrated why it makes no difference under the Act's media-neutral provisions that the revised collective works are fixed in electronic media – *i.e.*, on disks rather than paper copies. Relying on those provisions and the relevant legislative history, petitioners refuted the rationale underlying the Second Circuit's contrary holding. It is irrelevant that electronic copies in some instances do not retain *all* of the selection and arrangement of the paper editions and that users seek to retrieve individual articles. The former is precisely what makes the electronic copies "revisions," and the latter rests on a theory of contributory infringement affirmatively waived by respondents and foreclosed by *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 446 (1984). Publishers are privileged to create electronic copies, just as they may publish microfilm copies. Both are fixed in a different medium from print editions, contain multiple editions on a single reel or disk, and are used to identify and retrieve individual articles.

Respondents do not seriously defend the court of appeals' reasoning and focus instead on the manner in which electronic copies are fixed and may be retrieved by third parties. These newfound arguments, however, are equally erroneous, as this reply demonstrates in five parts. *First*, respondents' attempt to narrow the scope of Section 201(c) is flawed: The electronic versions of print periodicals are permitted by the broad "any revision" privilege because they substantially retain the editorial selection of the collective work. Indeed, respondents' position would overturn the compromise struck by Section 201(c) between the right of publishers to engage in the reproduction and distribution of their collective works in the aggregate in any medium and the right of freelance authors to exploit their individual contributions apart from the collective work. *Second*, respondents' claim that individual articles in the

electronic copies are published apart from the collective work misstates the record; the district court found precisely the contrary on the undisputed summary judgment record. *Third*, respondents' claim that when periodical copies are fixed electronically they constitute either a "new anthology" or an entirely different collective work, because individual files of other articles also may be fixed on the same disk or tape, conflicts with the Act's media-neutral provisions. If accepted, respondents' argument would make it impossible to continue to use computer storage in ways that have become familiar to countless researchers, publishers, libraries and others. *Fourth*, the remaining alternative arguments advanced only by the Garson respondents – that a publisher may not license reproduction and distribution of its collective work and that electronic publication by petitioners infringes upon freelance authors' "display rights" – are contradicted by the plain language of the Act. *Finally*, even if the right of publishers, in which freelancers have long acquiesced, to publish their works electronically were open to question, it would be for Congress to overturn this long-settled publishing practice, particularly given that the Second Circuit's judgment will result in wholesale deletions of freelance contributions, with correspondingly grave consequences for research.

ARGUMENT

I. The Electronic Copies At Issue In This Case Qualify As "Revisions" Under Section 201(c).

1. Section 201(c) grants publishers the right to include freelance contributions in "any revision" of their collective works. Respondents have no effective answer to precedents of this Court that emphasize the great breadth of the term "any." *See* Pet. Br. 21 (citing cases). They argue only that, depending on context, some limitations on that term may exist. *See* Garson Br. 21-25. Section 201(c), however, does not suggest any contextual limitation. The Second Circuit's "floor-to-ceiling" approach is entirely artificial, *see* Pet. Br. 25-27, and the Tasini respondents understandably do not defend it. They also appear to acknowledge that a proper Section 201(c) "revision" can be

an "amended, improved or updated" version, *see* Tasini Br. 25, terms that aptly describe the collective works as transmitted by the publishers to NEXIS and fixed on CD-ROMs.

The Tasini respondents assert, without further explanation, that a revision must be of the same "type" as the original, contain contributions of the same "kind," and retain "the same 'selection, coordination, *or* arrangement.'" Tasini Br. 16, 26 (emphasis added).[1] That proposal, however, directly conflicts with the text of Section 201(c). If the revision must be the "same" in all these respects, it can hardly be called a "revision." The district court was correct to conclude instead that a revision must simply be a "recognizable version" of the original. *See* Cert. App. 61a, 73a.[2]

Significantly, respondents do not defend the Second Circuit's conclusion that the differences between the print and electronic versions in this case – particularly the failure to retain the print-only aspects of arrangement (such as placement above-the-fold) or selection (such as advertising and similar materials) – disqualify the electronic copies from being "revisions."[3] Those differences properly are characterized as creating a revised collective work but one that plainly is recognizable as an "amended" version of the original. This is particularly so given, as the district court concluded and respondents do not dispute, that the defining characteristic of a periodical is its editorial selection. *See* Cert. App. 70a, 73a;

1. Respondents' adoption of the disjunctive here is revealing: It underscores the irrelevance of the fact that the electronic version retains such features as pagination and column location only referentially rather than visually and might in that sense be said to have an "arrangement" distinct from that of the print version.

2. Petitioners argued and the district court found that NEXIS contains revisions of the subject periodicals; the NEXIS database is not itself a revision. *See* Cert. App. 73a; *accord* Tasini Br. 32.

3. The Second Circuit's view that the "revision" privilege encompasses only a later daily edition of a newspaper, Cert. App. 10a, would also deprive that privilege of any meaning for all other collective works, including magazines.

see also Feist Publ'ns, Inc. v. Rural Tel. Serv. Co., Inc., 499 U.S. 340, 357 (1991) (compilation copyright extends to "selection, coordination, *or* arrangement") (emphasis added). For that reason, even though a Braille edition or the national edition of a major metropolitan newspaper may reflect substantially different arrangements and even different selections of articles, they would be properly regarded as "revisions" of the original collective work.

Elements other than selection – such as arrangement or layout on the printed page – are less relevant because they reflect the particular print *medium* in which the collective work happened to be fixed. Here, that NEXIS fails to retain exact page layout, *see* Pet. Br. 4, reflects only the reality that ASCII text, the dominant system at the time NEXIS was created (and, not incidentally, at the time the 1976 Act was adopted), could not reproduce photographic images. Petitioners' view also is reinforced by the legislative history, which confirms that Congress anticipated that publishers would make far more substantial "revisions" than are at issue in this case.[4]

Nor is there any serious argument that the *GPO* product – which retains the selection, coordination, *and* arrangement of the collective work as it is fixed on paper – qualifies as (at the very least) a "revision." Indeed, as petitioners argued in their opening brief but respondents fail to address, *GPO* is properly privileged as "that particular collective work" for purposes of reproduction and distribution under Section 201(c). *See* Pet. Br. 20.

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4. *See* J.A. 615a (authors' representatives recognized that revision privilege "obviously" permitted publishers to "chang[e] the contributions, or their order, or includ[e] different contributions"); J.A. 591a (publishers could change as much as 50% of content); J.A. 664a, 706a (publishers could include contribution in subsequent edition 10 years later). *Cf. Mills Music, Inc. v. Snyder*, 469 U.S. 153, 156 (1985) (legislative history of Copyright Act is particularly instructive interpretative tool).

2. Adopting respondents' position also would overturn the compromise between the interests of publishers and those of freelance authors embodied in Section 201(c). *Cf. Stewart v. Abend*, 495 U.S. 207, 230 (1990) ("Absent an explicit statement of congressional intent . . . it is not our role to alter the delicate balance Congress has labored to achieve."); J.A. 631a (Statement of the Register of Copyrights) (Copyright Act is "neither an 'author's bill' nor a 'user's bill,' " but rather a series of "carefully worked-out compromises"). Although Congress sought to preserve certain "subsidiary rights" for freelancers, J.A. 574a (testimony of Harriet Pilpel), including the right to syndicate or otherwise exploit their articles on an individual basis, it did not intend Section 201(c) to interfere with publication of the collective work as an aggregate whole. *See generally* Pet. Br. 28-32. The electronic copies in this case do not interfere with those rights or with respondents' exploitation of their individual contributions in any other way. Indeed, respondents admitted in the district court that petitioners' electronic publication has not interfered at all with their ability to market their individual contributions. *See* J.A. 398a-401a, 413a-14a, 428a, 447a-49a; *see also id.* 401a, 414a (neither microfilm nor electronic distribution has had an economic impact on respondents).

Conversely, respondents' approach grants them veto power over electronic publication of entire collective works. It literally requires the permission of each and every freelance contributor before any electronic reproduction or distribution. *E.g.*, Garson Br. 10 ("If the publisher wishes to print . . . its collective works — with a freelance contribution included — then it must either expressly obtain rights . . . or an exemption from liability."). Respondents advance this view even though their supporting *amici* acknowledge that individual freelance contributions add only marginally to the economic value created by the electronic copies. *E.g.*, ALA Am. Br. 15 ("success of the Petitioners' commercial electronic databases" results from "factors unrelated to the inclusion of freelance articles"). Given that Congress

characterized Section 201(c) as a "fair balancing of equities," H.R. Rep. No. 94-1476 at 122, J.A. 706a, it is inconceivable that it intended each freelance author to be permitted to interfere so fundamentally with a publisher's exploitation of its collective work copyright. *Cf. Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 526 (1994) (explaining that the plaintiff in an infringement action "is by no means always . . . the only holder of a copyright").

II. Petitioners Publish Each Of Their Collective Works As An Aggregate Whole, Not As Individual Articles.

1. Respondents' principal argument is that their articles are reproduced and accessed individually. The Tasini respondents thus assert that petitioners "select[] out of the day's edition the news and feature articles and . . . prepare[] a series of individual electronic files," Tasini Br. 7, while the Garson respondents argue that petitioners "disassemble their collective works," Garson Br. 14. In support of those and related statements, respondents consistently cite not to actual evidence in this case, but instead to an affidavit submitted by respondents' counsel in the district court. *See* J.A. 65a-115a.

The evidence and the district court's findings are uniformly to the contrary: Petitioners exploit their periodicals only as a whole and are compensated only on that basis. *See generally* Cert. App. 29a-32a. The publishers send precisely the same files to NEXIS as they send to the printer in order to produce the hard-copy edition and do so on an edition-by-edition basis. *Id.* 29a-31a; J.A. 476a-79a. None of the petitioners engages in *any* intervening selection of articles – *i.e.*, NEXIS contains the entire editorial contents of each collective work. Cert. App. 70a n.13 ("[T]here is no intervening original selection of articles that might render NEXIS or UMI's CD-ROMs separate collective works."); J.A. 477a-78a. *See generally* J.A. 470a-81a, 498a-512a (parties' statements of undisputed material facts); SIIA Am. Br. 14-16.

Respondents' two further arguments relating to the transmittal from publishers to NEXIS are unavailing. "Tagging"

articles, *see* J.A. 502a, 504a, 506a, certainly does not disaggregate the collective work. *Contra* Tasini Br. 36-37; Garson Br. 33-34. To the contrary, the information added serves only to maintain the relationship between the collective work and its constituent articles both electronically (*i.e.*, with appropriate computer coding) and for the reader (*i.e.*, by setting forth the name of the periodical, the date, the section name, and the page and column numbers in which the article appeared in the print edition). *See* Cert. App. 70a-71a (petitioners take "numerous steps to highlight the connection between plaintiffs' articles and the hard copy periodicals in which they first appeared").

The Tasini respondents also revive an argument they abandoned in the court of appeals, emphasizing the licensing agreements between the publishers and NEXIS. *See* Tasini Br. 6-10. The right to publish "part of" the periodicals at issue, however, simply accounts for the publishers' unquestioned right to publish staff-written articles apart from the collective work and reflects the fact that a revision need not include a publication's entire selection. *See* Cert. App. 76a-77a n.17 ("the publisher is merely taking advantage of the fact that there is more than one way to revise a collective work"). Also dispositive is the simple (and undisputed) fact that petitioners have never reproduced or distributed freelance contributions apart from the collective works in which they appear.

2. Because petitioners engage in the publication of their periodicals in the aggregate, this case is properly analogized not to an "article reprint service" or breaking a car into "spare parts," *contra* Tasini Br. 38-41; Garson Br. 1-2, but rather to microfilm and microfiche. Although some of respondents' arguments even call microform into serious question,[5] they

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5. *See* Pet. Br. 6, 10-11, 14, 18-19, 45-46 (collecting examples, including in respondents' complaint); *see also*, *e.g.*, Tasini Br. 12 (unlawful to permit users to identify, display, or print any "individual articles").

ultimately concede, as they must, that it is a permissible and longstanding means of publishing collective works, having been in existence for decades by the time Congress adopted Section 201(c). *See* Garson Br. 4 n.3. As the district court found, "A newspaper does not cease to be a newspaper [when it is] used primarily for research purposes [and] consulted only for particular articles identified by researchers in periodical indices." Cert. App. 75a n.16. To the contrary, "*the primary goal of research* . . . is to identify and retrieve individual articles." Hist. Am. Br. 16 (emphasis in original); *see also* Pub. Am. Br. 3.

Nothing else is involved in this case. Petitioners have not culled individual articles, or "parts," out of the collective work, whether for customers to purchase or for any other purpose. An electronic library simply combines the two steps of looking through indices such as *The Reader's Guide To Periodical Literature* and locating the article in the collective work in the stacks. That it does so more quickly and more accurately is entirely consistent with the information-disseminating goals of the Copyright Act. *Accord Mills Music*, 469 U.S. at 172 (rejecting Second Circuit's "assum[ption] that Congress was unaware of a common practice in one of the industries that the general revision of the copyright law . . . most significantly affected").[6] Respondents' position frustrates, and turns on its

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6. The "spare parts" analogy also is inaccurate because articles in NEXIS – which contain notations of the periodical, date, pagination, etc. – clearly indicate their relationship to the original collective work even once retrieved. These notations serve as "electronic staples" binding the articles to the periodical from which they came. As the district court explained in rejecting respondents' spare parts analogy, this relationship imbues the article with credibility and context that it would not have as a stand-alone item.

> To the extent that the articles appearing in electronic form can be likened to car parts, then, it is not those parts that can be fitted into most makes and models, but those that

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head, Congress's plan to embrace and promote the development of new media technologies. J.A. 638a.

The analogy to microfilm also demonstrates that respondents are wrong to emphasize that NEXIS users may print individual articles rather than entire periodicals. *E.g.*, Tasini Br. 33-35. That argument not only rests on a theory of third party conduct that, under *Sony*, is irrelevant to the direct infringement claim pursued by these respondents, *see* Pet. Br. 47-48, but also looks artificially to the last step of the research process. As the Tasini respondents admit, when a NEXIS subscriber "enters her password and gains access to the database she is not presented with the text of an article," but instead with a list of periodical libraries, all of which must be first searched. Tasini Br. 4. The district court correctly found that NEXIS makes only entire periodicals available to users – *i.e.*, users must search the entire editorial text of the daily editions of *The New York Times*, not individual articles or collections of freelance articles – and charges users on that basis. Cert. App. 30a; J.A. 85a. The publishers, in turn, are compensated not per article but for providing their entire editorial contents. J.A. 471a-75a; *accord* ALA Am. Br. 6.[7] Congress could not possibly have intended to require a user who identifies an article in an electronic copy to *read* the periodical cover-to-cover just because the article happens to have been written by a freelance author.[8] In an effort

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> are available only at a premium because they meet the design specifications for a particular model produced by a particular automobile manufacturer.

Cert. App. 71a n.14.

7. *See also* Skinner Dep. 53 and McDonald Dep. 38-39, Exhibits 35 and 32, respectively, to the Affidavit of Emily Bass, Esq., dated March 15, 1996, J.A. 114a.

8. Respondents' specific contention that it is difficult to retrieve a full day's edition of a periodical in NEXIS is clearly wrong. As the district court found, and respondents have admitted, a user can readily

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to deny NEXIS the status of the electronic library anticipated by Congress, respondents incorrectly assert, without any factual support, that NEXIS reproduces and distributes multiple copies of the periodicals and articles fixed within its servers. Tasini Br. 40, 5-6. Just as multiple users may visit a "print" library to view an article fixed on a microfilm spool, so too multiple users access the single periodical (and article) copy fixed within the NEXIS library. Neither NEXIS nor the "print" library makes additional copies any more than they do when a user presses the "print" button on a microfilm reader.[9]

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retrieve the entire selection of a particular edition of a periodical. Cert. App. 30a-31a; Garson Br. 4; *see also* J.A. 472a, 474a, 475a, 477-78a. Within the *Times* directory, a user would retrieve the entire editorial contents of the March 15, 2001 edition with the entry: "date is 3/15/2001."

9. To the extent that respondents' argue that petitioners are distributing individual articles to users of NEXIS, they are simply wrong. Electronic transmissions are not a distribution, which occurs only when physical "copies" change hands. *Agee v. Paramount Communications, Inc.*, 59 F.3d 317, 324-26 (CA2 1995) (satellite transmission of sound recording not a distribution because physical copy does not change hands); *see also* 17 U.S.C. § 106(3) (describing exclusive right to distribute copies – which are material objects – publicly). Although petitioners distribute copies of their periodicals in CD-ROM, that distribution is no different from that of microfilm and is fully privileged by Section 201(c). To the extent there is any reproduction of an article other than the one that resides on a disk in the NEXIS server or on a CD-ROM inserted into a computer at a library workstation, that reproduction occurs in exactly the same way as when one uses the print function of a microfilm reader, or the record button on a VCR. This gives rise, at best, to the very contributory infringement claim respondents waived below. Pet. Br. 47-48.

III. Respondents' Arguments Conflict With The Media-Neutral Terms Of The Copyright Act.

Respondents argue at length that a collective work is changed in some fundamental way from the print copy when it is stored electronically. Most extreme is the argument that a work never can be fixed electronically because it will be stored as separate bits and bytes. *See* Tasini Br. 8 n.2 ("[O]ne cannot open up a computer and 'draw a circle' around the group of files that contain, say, the text of articles constituting a particular issue of Sports Illustrated."). Alternatively, respondents contend that, once placed in a database, all the articles in a collective work take on an independent status. *E.g.*, *id.* at 34-36. Finally, respondents claim that the NEXIS database is itself a new collective work that contains only numerous individual articles, and not collective works published originally in hard copy. *E.g.*, *id.* at 43-46.

These theories are contradicted by the Copyright Act's media-neutral provisions.[10] The Act's basic definitional provisions carefully distinguish among a "work," the "medium" in which it is "fixed," and the "copy" that results upon fixation. A "collective work," such as the periodicals in this case, is "a work formed by the collection of preexisting materials [*i.e.*, individual articles] . . . that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship." 17 U.S.C. § 101. A hard copy, print edition of the periodical is one type of "copy," which is defined as a "material object[] . . . in which a work is fixed and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device." The work becomes "fixed" "when its embodiment in a copy . . . is sufficiently permanent or stable to

10. *Cf. Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340, 346 (1998) (looking to related provisions of Copyright Act in determining meaning of "court"); *Quality King Distribs. v. L'anza Research Int'l, Inc.*, 523 U.S. 135, 149-51 (1998) (construing 17 U.S.C. § 602(a) in light of §§ 106, 109(a) and 107-120).

permit it to be perceived, reproduced, or otherwise communicated for a period of more than transitory duration." *Id.* The work may be fixed "by any method now known or later developed." *Id.*; *see also id.* § 102 ("Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.").

For purposes of copyright infringement analysis, petitioners' collective works are distinct from the paper "copies" in which they may be "fixed." As the Act states, "literary works" such as periodicals remain the same "works . . . *regardless of* the nature of the material objects, such as . . . periodicals [or] disks, or cards, in which they are embodied." *Id.* § 101. (emphasis added). The legislative history similarly explains that "a 'book' is not a work of authorship, but is a particular kind of 'copy.' Instead, the author may write a 'literary work,' which in turn can be embodied in a wide range of 'copies' and 'phonorecords,' including books, periodicals, computer punch cards, microfilm, tape recordings, and so forth." H.R. Rep. No. 94-1476 at 53, J.A. 697a. [11]

Respondents' varied attempts at characterizing the manner in which petitioners' collective works are fixed on the NEXIS disks or UMI CD-ROM disks cannot be reconciled with these

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11. *See also id.* (explaining the "fundamental distinction between the 'original work,' which is the product of 'authorship,' and the multitude of material objects in which it can be embodied"); *id.* at 52, J.A. 695a (explaining that the Act's "broad language" specifically was "intended to avoid the artificial and largely unjustifiable distinctions . . . under which statutory copyrightability . . . has been made to depend upon the form or medium in which the work is fixed"); *L. Batlin & Son, Inc. v. Snyder*, 536 F.2d 486, 491 (CA2) (en banc) ("the mere reproduction of a work . . . in a different medium" does not create a new work), *cert. denied*, 429 U.S. 857 (1976).

basic copyright concepts. Petitioners' publications are the same "collective works" whether fixed on paper copies or instead on disks. That a person looking at a CD-ROM or the disk stored inside the NEXIS computer cannot see, much less "draw a line" around, an edition of *Sports Illustrated* is irrelevant. The Act provides that the work may be "perceived . . . with the aid of a machine or device." 17 U.S.C. § 101. Similarly, that the collective work is stored as a series of individual files cannot be determinative. It reflects nothing more than that it is a "collective work," which, by definition, is composed of "a number of . . . independent works." *Id.* The proper question is whether those individual files are and remain fixed in a tangible medium of expression in a way that permits the collective work to be "perceived . . . with the aid of a machine." *Id.* The Act specifically recognizes that a work may be fixed in "disks" or "cards" (a reference to storage of information by punchcards), both of which involve disaggregating a collective work into smaller building blocks.[12] In this case, the district court found that the entire work is "fixed" when the publisher transmits it to NEXIS, and that petitioners take substantial steps to ensure that the individual articles retain their collective work status both in computer coding and in explicit references to the hard-copy edition (such as periodical title, date, and page number). *See supra* at 7.[13]

12. Respondents' bare assertion that NEXIS itself could be registered as a collective work, *see* Tasini Br. 45, is not correct. The Copyright Office will not register electronic databases "where the collection and arrangement" consist, as is the case here, of mechanically "transferring data from hard copy to computer storage." Circular 65, Copyright Registration for Automated Databases 1 (U.S. Copyright Office 1999).

13. *Matthew Bender & Co., Inc. v. West Publ'g Co.*, 158 F.3d 693, 702-703 (CA2 1998), *cert. denied*, 526 U.S. 1154 (1999), does not hold that collective works can never be fixed in an electronic medium. *Contra* Garson Br. 12, 39, 44. To the contrary, it is accepted that a work does not lose its copyrightable aspects when placed in a database. *See CCC Information Servs. v. MacLean Hunter Market Reports, Inc.*, 44 F.3d

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Respondents' approach, if adopted, also would produce absurd practical results. No copyright holder could allege that any electronic reproduction was infringing if the test were whether it is possible to "draw a circle" around a work stored in the bits and byes of a computer. Even a single computer file "may be fragmented across far-flung regions of the disk." Tasini Br. 8 n.2 (internal quotation omitted). Similarly, a publisher could never assert that a large database infringed upon its "collective work" copyright, because all of the component articles would be stored in separate files or "immersed" in the database. *See* Cert. App. 76a (on a proper understanding of the Act, "if NEXIS was produced without the permission of The New York Times or Newsday or Time, these publishers would have valid claims of copyright infringement against" NEXIS). Nor is it easy to understand how an electronic magazine could ever secure a copyright if, as is the overwhelming practice, articles are stored individually. Conversely, under respondents' theories, every work stored electronically would be transformed into part of a "new anthology" with everything else fixed on the disk.[14]

(Cont'd)

61, 68 n.8 (CA2 1994). *Matthew Bender* simply held that the print arrangement of a collective work – the only element of the collective works at issue in that case – was not fixed in an electronic medium. That is less true in this case because, as noted, petitioners take extensive steps to reflect the arrangement of the hard-copy edition in the electronic copies. In any event, it is irrelevant to the more important question whether "selection" is maintained.

14. That result specifically cannot be reconciled with Congress's intent that libraries and owners of computer programs have the right to make "archival copies" of works, *see* 17 U.S.C. §§ 108(a), 117, which is frequently done by placing a copy of the work, along with others, on a computer hard drive or other storage medium. *See* Hist. Am. Br. 8. New, infringing anthologies would be created whenever multiple files are stored on a personal computer's hard or floppy disk, or on blank tapes.

None of those results is tenable. Congress intended the Copyright Act to encourage, not impede, the development of computer technologies. One of the Act's chief drafters explained as early as 1965 that the Act contained no "reference to computers" precisely so that its "broad rights . . . can be adapted as time goes on to each of the new advancing media." J.A. 638a. The legislative history also repeatedly contains examples, from the early 1960s to the Act's passage in 1976, of how computer storage "makes possible automatic location and reproduction either on a screen or on paper of the pages of a book or journal located in a central storage miles away." J.A. 652a. Respondents' argument is nothing less than an attempt to turn back the technological clock.[15]

IV. The Garson Respondents' Remaining Arguments Are Erroneous.

The Garson respondents press two arguments not adopted by the Second Circuit. Neither is availing.

1. They first maintain that, because Section 201(c) grants publishers only a non-transferable "privilege" of reproduction and distribution, licensing arrangements are forbidden. *See* Garson Br. 26-29. This argument rests on an artificial definition of "privilege" that has no place in this context, particularly because the legislative history of Section 201(c) uses the terms "rights" and "privileges" interchangeably. Pet. Br. 20 n.12; J.A. 556a, 585a, 595a, 657a. When Congress intended "privileges" to be limited, it said so expressly.

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15. *See also* H.R. Rep. No. 94-1476 at 47, J.A. 685a. ("During the past half century, a wide range of new techniques for capturing and communicating printed matter, visual images, and recorded sounds have come into use, and the increasing use of information storage and retrieval devices . . . promises even greater changes in the near future. The technical advances have generated new industries and new methods for the reproduction and dissemination of copyrighted works, and the business relations between authors and users have evolved new patterns.").

E.g., 17 U.S.C. § 109(d); *see also* Cert. App. 47a-50a. Moreover, if accepted, this theory would mean that a publisher could not license reproduction even of the collective work in print, not just of an electronic revision. The Garson respondents fail to offer any reason to think that Congress intended to impose so extraordinary a limitation on publishing activities. In addition, the Garson respondents' premise that Section 201(c) grants publishers a *non-exclusive* license is clearly wrong. Under Sections 201(c) and 106, only the publishers own the right to reproduce and distribute their collective works, including freelance contributions. That is an exclusive right and nothing in the text or the legislative history of the Act suggests that it is non-transferable.

2. The Garson respondents next argue that electronic publication infringes upon freelance authors' "display right." The Tasini respondents affirmatively disavow reliance on this point — appropriately so, because it was not raised in the court of appeals. Tasini Br. 19-20 n.5.[16] This argument rests on the

16. The Garson respondents do not maintain that the statement by the Register of Copyrights advancing the "display right" theory, Garson Br. A1-A13, is entitled to deference, and it is not. *See Christensen v. Harris County*, 529 U.S. 576, 586-87 (2000); *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144, 156-57 (1991). The Register's views are not even entitled to the persuasive force of an *amicus* brief presenting the views of the United States, which the Acting Solicitor General determined not to file in this case. *Cf.* Marybeth Peters, *Presentation of Marybeth Peters, Esq.*, 17 U. Dayton L. Rev. 755, 755 (1992) (emphasizing that the Copyright Office view does not represent that of "the 'United States' "). The Register's support for the Second Circuit's judgment (if not its rationale) also contradicts her oft-stated view that changes in "format" do not bear on the issue of the copyrightability of collective works. Marybeth Peters, *The Copyright Office and the Formal Requirements of Registration of Claims to Copyright*, 17 U. Dayton L. Rev. 737, 741 (1992). As Ms. Peters has explained, "Copyright law tends to be framed in the nature of the work rather than the medium." *Copyright Experts Debate Whether Fair Use Will Wither on Electronic "Pay-Per-View" Vine*, 45 Electronic Commerce & Law Report (BNA) 1143 (Nov. 22, 2000). This is because changes in "forms of expression dictated solely by functional considerations" do not change the underlying copyrightable work. Peters, 17 U. Dayton L. Rev. at 743.

flawed premise that the rights listed in Section 106 of the Copyright Act are mutually exclusive — *i.e.*, that there is a clear line between "display" (which is not mentioned in Section 201(c)) and "reproduction" and "distribution" (which are). In reality, those rights "overlap." H.R. Rep. No. 94-1476 at 61. In particular, the "copies" of collective works that petitioners have the unquestioned right to reproduce may be "perceived . . . with the aid of a machine or device," 17 U.S.C. § 101, which is precisely what occurs with both NEXIS (from a remote location) and *GPO* (using a local computer).[17]

Nor is there any reason to believe that Congress intended to withhold the "display right" from publishers. If it had, a publisher could not publicly display a freelance contribution even as part of the hard-copy collective work. To take the simplest example, a publisher could not reproduce on a billboard an advertisement for its newspaper that displayed a freelance contribution on page one. Nothing in the statutory text or legislative history suggests that Congress intended such a bizarre result.

V. Modification Of The Section 201(c) Compromise Is A Matter Properly Left To Congress.

For the foregoing reasons, the electronic publications at issue in this case fall squarely within the Section 201(c) privilege. Even if that were open to some doubt, however, the matter should be left to be resolved by Congress. This Court has consistently relied upon Congress to make appropriate legislative adjustments "when major technological innovations alter the market for copyrighted materials." *Sony*, 464 U.S. at 431. That approach is particularly sound here because Congress has twice rebuffed freelancers' proposals that Section 201(c)

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17. On the mistaken view that Congress intended to withhold any right not expressly mentioned in Section 201(c), a publisher could not "publicly perform" freelance contributions as part of a collective work – much the way Mayor LaGuardia did during the famous New York newspaper strike, reading the newspaper over the radio.

be amended to produce the result that they now press in this Court. *See* Pet. Br. 37-39.

Even more important in this respect is that the Second Circuit's judgment, if affirmed, will disrupt years of settled expectations as to how the allocation of rights embodied in Section 201(c) was to apply to the "advancing media." The decision to publish periodicals in electronic form was accepted by thousands of writers, who knew of computer storage long before this lawsuit and received benefits both in increased speed of research and in availability of their works. *Cf. Sony*, 464 U.S. at 456 ("One may search the Copyright Act in vain for any sign that the elected representatives of the millions of people who watch television every day have made it unlawful to copy a program for later viewing at home. . . ."). Even if no court orders injunctive relief, the Second Circuit's judgment will require the wholesale deletion of hundreds of thousands of freelance contributions because no rational publisher would risk the liability exposure from the "tidal wave" of litigation avowedly fomented by lead-respondent Tasini. *See* Cert. Pet. 12-13; Pub. Am. Br. 20-21; *see also* Barbara Quint, *Gale Group and Dialog to Gather Gannett Newspapers*, Information Today, March 1, 2001, at 1 (as a result of Second Circuit's decision, Gannett's archival online service will "eliminat[e] all content from freelance authors for which [Gannett] does not have clear electronic rights," leaving "searchers unable to know what has and hasn't been covered in the course of a search"). But for the stay of mandate entered by the Second Circuit, those deletions already would be under way. *See* J.A. 529a-32a, 535a-36a, 541a-42a (sworn testimony in support of stay application that deletions will be only available alternative).[18]

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18. The 21 articles written by respondents have already been deleted from NEXIS. Of particular note, the publisher of *U.S. News & World Report* reacted to the Second Circuit's judgment in this case by omitting freelance contributions from microfilm copies. Hist. Am Br. 16 n.17.

Similarly, prohibitively "high transaction costs," ALA Am. Br. 5, 15, make it impossible for publishers to clear decades' worth of rights held by freelance authors, their assignees, and heirs. *See* Pet. Br. 49. Some of respondents' *amici* be little the consequence of these massive deletions, ASMP Am. Br. 26, but they ignore the loss to society that will result. Hist. Am. Br. 13-14. Respondents' proposed Publication Rights Clearinghouse, *see* Tasini Br. 50, ignores both the fact that a judgment for respondents in this case creates substantial retroactive liability and the fact that the six plaintiffs in this case obviously cannot require their fellow freelancers to participate in their preferred (non-binding) solution. *See* Pub. Am. Br. 20-21.

CONCLUSION

For the foregoing reasons and those stated in petitioners' opening brief, the judgment of the Second Circuit should be reversed.

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